No. 03-1274

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JUANITA SWEDENBURG, IN HER OWN CAPACITY, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, CHAIRMAN OF THE STATE LIQUOR AUTHORITY, DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE OF NEW YORK, IN HIS OFFICIAL CAPACITIES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR STATE OF NEW YORK RESPONDENTS

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QUESTIONS PRESENTED

1. Whether New York's ban on direct shipment of alcoholic beverages by unlicensed out-of-state wineries falls within the powers conferred upon the States by the Twenty-First Amendment.

2. If not, whether New York's direct shipment ban violates the dormant Commerce Clause.

3. Whether New York's direct shipment ban violates the Privileges and Immunities Clause of Article IV.

PARTIES TO THE PROCEEDINGS

Petitioners, who were plaintiffs-appellees below, are Juanita Swedenburg, in her own capacity and as proprietor of Swedenburg Winery, a Virginia partnership; David Lucas, in his own capacity and as proprietor of The Lucas Winery, a California sole proprietorship; and Patrick Fitzgerald, Cortes DeRussy, and Robin Brooks, who are New York residents.

State respondents, who were defendants-appellants below, are Edward F. Kelly, Chairman of the New York State Liquor Authority, Division of Alcoholic Beverage Control, State of New York, in his official capacity; and Lawrence J. Gedda and Joseph Zarriello, Commissioners of the New York State Liquor Authority, in their official capacities.

Private respondents, who were intervenor-defendants-appellants below, are Charmer Industries, Inc., Peerless Importers, Inc., Premier Beverage Company LLC, and Eber Brothers Wine and Liquor Corp., each a New York-licensed alcoholic beverage wholesaler; Local 2D of the Allied Food and Commercial Workers International Union, a union comprised of commissioned alcoholic beverages salespeople in the New York metropolitan area; and Metropolitan Package Store Association, Inc., a trade association of New York-licensed alcoholic beverage retailers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 358 F.3d 223 (2d Cir. 2004). The opinion of the district court granting summary judgment to petitioners (Pet. App. 34a-71a) is reported at 232 F. Supp. 2d 135 (S.D.N.Y. 2002). The order of the district court entering judgment for the petitioners (Pet. App. 72a-73a) is not reported.

STATEMENT OF JURISDICTION

The judgment below was entered on February 12, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Like many other states, New York has long had a three-tiered system for the distribution of alcoholic beverages. N.Y. Alco. Bev. Cont. Law §§ 1 *et seq.* ("ABC Law"). Under this system, manufacturers of alcoholic beverages sell their products to licensed New York wholesalers, who in turn sell them to licensed retailers; the retailers then distribute them to consumers. ABC Law § 100(1), (2). Like alcoholic beverages manufactured in New York, alcoholic beverages imported from other states are also subject to this regulatory regime. Thus, section 102(1)(c) of the ABC Law provides that "[n]o alcoholic beverages shall be shipped into the state unless the same shall be consigned to a person duly licensed hereunder to traffic in alcoholic beverages." *See also* ABC Law § 102(1)(d) (applying same restriction to common carriers).

Licensed wineries, however, can opt out of this three-tiered system. A licensed winery may sell and ship its wine to another licensed winery, a wholesaler, or a retailer. *Id.* § 77(1). It also may obtain a retail license allowing it to sell and ship its wines directly to consumers. *Id.* §§ 76(4), 77(2). This option is available not only to New York wineries, but also to wineries that manufacture their wine in other states, as long as they "maintain[] a branch factory, office or storeroom within the state of New York and receive[] wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state." *Id.* § 3(37).

These provisions of the ABC Law, which ban direct shipment by unlicensed out-of-state wineries, but make a license to ship available to any winery with a physical presence in New York, are at the center of the current litigation. In February 2000, the proprietors of two out-of-state wineries (petitioners Juanita Swedenburg and David Lucas), together with three New York wine consumers (petitioners Patrick Fitzgerald, Cortes DeRussy, and Robin Brooks), filed suit against three officials of the New York State Liquor Authority ("SLA")in the United States District Court for the Southern District of New York. Petitioners argued that sections 102(1)(c) and (d) of the ABC Law, which prohibit the direct importation of alcoholic beverages to New York consumers, unfairly discriminate against out-of-state wineries. They sought a declaration that these provisions were unconstitutional under the dormant Commerce Clause and Article IV's Privileges and Immunities Clause. They also sought an injunction barring enforcement of the challenged provisions.[1]

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1. Petitioners also challenged section 102(1)(a) of the ABC Law, which limits the solicitation of orders for alcoholic beverages, and both the district court and the Second Circuit invalidated that provision. Pet. App. 30a-33a; 67a-68a. This issue is not before the Court.

After the parties cross-filed for summary judgment, the district court granted summary judgment in favor of petitioners. Pet. App. 34a-71a. It held that a regulation limiting the importation of alcohol in a manner that discriminated against interstate commerce would survive a dormant Commerce Clause challenge only if it promoted one of the "core concerns" underlying the Twenty-First Amendment. *Id.* at 59a. The court found that the goals of temperance and preventing sale of wine to minors could adequately be served by alternatives less restrictive than New York's regulatory scheme, and that the challenged provisions therefore were not saved by Section 2 of the Twenty-First Amendment. *Id.* at 61a. The court entered judgment in petitioners' favor, enjoining the State from enforcing sections 102(1)(c) and (d) in a manner that would prohibit the winery petitioners "from shipping their wine to New York consumers on the same terms and conditions applicable to New York wineries," but stayed its judgment pending appeal. Pet. App. 72a-73a.

Both the State and private intervenors timely appealed, and the Second Circuit unanimously reversed the judgment of the district court. *Id.* at 1a-33a.

The court first acknowledged that five other circuits had recently considered the constitutionality of similar direct shipment bans. *Id.* at 11a. These courts of appeals, the Second Circuit noted, had developed conflicting frameworks in analyzing the interplay between the Twenty-First Amendment and the dormant Commerce Clause. *Id.* at 12a-13a.

As the Second Circuit recognized, the Fourth, Fifth, Sixth and Eleventh Circuits considered whether the challenged statute discriminates against or impermissibly burdens

interstate commerce, and if so, whether the statute was "saved" by advancing the Twenty-First Amendment. *Id.* at 12a (citing *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388, 400 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 514 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104, 1108 (11th Cir. 2002). In contrast, the Seventh Circuit "consider[ed] the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause." Pet. App. 13a (citing *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub nom. Bridenbaugh v. Carter*, 532 U.S. 1002 (2001)).

The Second Circuit adopted the Seventh Circuit's analytical framework. In the Second Circuit's view, the explicit grant of authority in Section 2 of the Twenty-First Amendment "should not . . . be subordinated to the dormant Commerce Clause." Pet. App. 16a. This view was based in part on the Amendment's historical origins as a response to a series of Supreme Court decisions invalidating state alcohol importation laws under the dormant Commerce Clause. *Id.* at 14a-16a (citing *Bowman v. Chicago & N.W. Ry Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Rhodes v. Iowa*, 170 U.S. 412 (1898)). These decisions had led first to the adoption by Congress of the Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2001)), and then to the adoption in 1913 of the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2000)), which was interpreted as having effectively divested alcoholic beverages of "their interstate commerce character." *James Clark Distilling Company v. Western Maryland Ry. Co.*, 242 U.S. 311, 325 (1917). The Second Circuit found

that, against this historical background, there could be little doubt that the Twenty-First Amendment, which closely tracks the text of the Webb-Kenyon Act, was intended to grant the States powers over the importation of alcohol that they would not otherwise have enjoyed under the dormant Commerce Clause. Pet. App. 14a-16a.

Applying these principles, the Second Circuit held that New York's ABC law falls within the scope of the Twenty-First Amendment's grant of authority and thus is exempt from dormant Commerce Clause scrutiny. *Id.* at 25a. The challenged statutory scheme, the court concluded, "regulates only the importation or distribution of alcohol in [the State]," "serves valid regulatory interests," and does not amount to "mere economic protectionism." *Id.*

Specifically, the Second Circuit found "no indication . . . that the regulatory scheme is intended to favor local interests over out-of-state interests." *Id.* "All wineries," the court said, "are permitted to obtain a license as long as the winery establishes a physical presence in the state." *Id.* The court also found that the physical presence requirement imposed on out-of-state wineries who sought a license was intended to serve legitimate regulatory goals. Presence "ensures accountability" by making "[r]ecords of sales and compliance with New York's regulatory requirements . . . available for inspection by SLA officials" and by making violators more readily subject to disciplinary measures. *Id.* at 25a-26a.

The Second Circuit further held that because New York's direct shipping ban did not discriminate on the basis of residency, it did not violate the Privileges and Immunities Clause. *Id.* at 29a-30a.

ARGUMENT

This Court should grant the questions regarding whether New York's direct shipment ban falls within the powers conferred by the Twenty-First Amendment and, if not, whether the ban violates the dormant Commerce Clause. There is a substantial conflict among the circuits as to the proper analytical framework for deciding such challenges, as well as a conflict as to the constitutionality of state direct shipment bans.

The Second and Seventh Circuits, acknowledging that section 2 of the Twenty-First Amendment uniquely protects state regulation of alcoholic beverages that might otherwise be suspect under the dormant Commerce Clause, have upheld direct shipment bans. In contrast, the Fourth, Fifth, Sixth, and Eleventh Circuits have articulated a two-step analysis for resolving these challenges. This approach first applies traditional dormant Commerce Clause scrutiny to state regulation of alcoholic beverages, and then asks if a statute that runs afoul of the Commerce Clause is "saved" by the Twenty-First Amendment. Applying this standard, these circuits have invalidated direct shipping bans.[2]

2. The Eleventh Circuit remanded its case for further fact-finding to determine if the ban advanced any legitimate state interests protected by the Twenty-First Amendment. *Bainbridge*, 311 F.3d at 1115-16. The remaining courts further divided over the appropriate remedy; the Fifth Circuit set aside Texas' direct shipment ban in its entirety (as applied to both in-state and out-of-state wineries), but the Fourth Circuit invalidated only certain exceptions to North Carolina's ban that were provided to in-state wineries alone.

Currently before this Court are petitions seeking review from the Sixth Circuit's decision invalidating Michigan's direct shipment ban. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *petitions for cert. filed sub noms., Granholm v. Heald*, No. 03-1116 (docketed Feb. 4, 2004), and *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, No. 03-1120 (docketed Feb. 4, 2004). Michigan's direct shipment statute differs from the New York statute upheld by the Second Circuit in respects that are relevant, and perhaps dispositive, of the questions related to the dormant Commerce Clause presented in both this case and *Heald*. Unlike Michigan law, New York law clearly permits out-of-state wineries to obtain a license for making direct shipments on the same terms as in-state wineries, provided that they maintain a physical presence in the State. *Compare Heald*, 342 F.3d at 521 *with* ABC Law §§ 3(37), 76(4), 77(2); *see also* Pet. App. 7a-8a. Should the Court deem the split among the circuits sufficient to warrant certiorari, it should grant the petitions in both cases in order to have before it well-developed records that elucidate this difference.

As to petitioner's Privileges and Immunities Clause claim, the Second Circuit's decision fully comports with the precedents of this Court. Nor is there any split among the circuits on this question. Accordingly, the Court should deny certiorari as to this question.

I.

THERE IS A SUBSTANTIAL CONFLICT AMONG THE CIRCUITS REGARDING THE INTERPLAY BETWEEN THE TWENTY-FIRST AMENDMENT AND THE DORMANT COMMERCE CLAUSE

The split among the circuits as to the interplay between the Twenty-First Amendment and the dormant Commerce Clause appears irreconcilable and is quickly deepening. Of the six circuits to have decided this issue in the last four years, the most recent decisions (from the Second and Sixth Circuits) are sharply divergent. Moreover, the analytical framework adopted by the Second Circuit had been advanced by the Seventh Circuit in the earliest of these cases, but was rejected by the circuits that rendered decisions in the interim. Because the petitions pending in the Second and Sixth Circuit cases, taken together, present the Court with legal approaches and statutory regimes that are meaningfully different, a grant of certiorari in both of these cases is appropriate to resolve the conflict.

As the Second Circuit frankly acknowledged, the analyses used by the various circuits that have reviewed dormant Commerce Clause challenges to state regulation of alcoholic beverages are fundamentally inconsistent. Pet. App. 12a-13a. The Second Circuit explicitly declined to adopt the analysis of the Fourth, Fifth, Sixth, and Eleventh Circuits: "We think this two-step approach is flawed because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of

section 2." *Id.* The Second Circuit instead adopted the approach that the Seventh Circuit had employed in *Bridenbaugh*. *Id.* at 13a.

In *Bridenbaugh*, the Seventh Circuit upheld an Indiana statute that "makes unlawful all direct shipments from out of state to Indiana consumers by any person in the business of selling alcoholic beverages in another state or country." *Bridenbaugh*, 227 F.3d at 849 (internal quotation omitted). The court rejected the plaintiffs' narrow interpretation of the Twenty-First Amendment, which would have required the invalidation under the dormant Commerce Clause of any state importation law not justified by the "core concerns" underlying the Amendment: "our guide is the text and history of the Constitution," the court said, "not the 'purposes' or 'concerns' that may or may not have animated its drafters." *Bridenbaugh*, 227 F.3d. at 851. Relying on the Amendment's history, the court concluded that the dormant Commerce Clause no longer forecloses state regulation of "direct shipments from out-of-state sellers to consumers that by-pass state regulatory (and tax) systems." *Id.* at 853. The court said that scrutiny of these laws under the dormant Commerce Clause would make the amendment "a dead letter," since importation regulations are discriminatory almost by definition: "Every use of § 2 could be called 'discriminatory' in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter." *Id.*

The Second Circuit, relying on the Twenty-First Amendment's legal history and jurisprudence, agreed with

the Seventh Circuit that the analysis of a state regulation governing alcohol importation must begin with a determination of whether it falls within the powers expressly conferred by the Twenty-First Amendment. Pet. App. 13a. This "mode of inquiry," the court explained, "considers the scope of the Twenty-first Amendment's grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is excepted from the effect of the dormant Commerce Clause." *Id.* "The inquiry, in our view, should not allow the protective doctrine of the dormant Commerce Clause to subordinate the plain language of the Twenty-first Amendment." *Id.*

The rigid two-step framework adopted by the Fourth, Fifth, Sixth, and Eleventh Circuits diverges sharply from the framework used by the Second and Seventh Circuits. *See Heald*, 342 F.3d at 526-27 (noting criticism of *Bridenbaugh*); *Bainbridge*, 311 F.3d at 1114 n.15 ("We disagree with the analytical framework used in [*Bridenbaugh*]. . . ."). These courts have first considered whether a direct shipment ban survives traditional dormant Commerce Clause scrutiny; *i.e.*, whether it discriminates against interstate commerce or imposes burdens on interstate commerce that are incommensurate with putative local gains. *Heald*, 342 F.3d at 524-25; *Dickerson*, 336 F.3d at 395-400; *Beskind*, 325 F.3d at 514-16; *Bainbridge*, 311 F.3d at 1108-10. Only then have these courts asked whether an otherwise-invalid alcohol regulation might be "saved" by advancing one of the Twenty-First Amendment's "core concerns." *Heald*, 342 F.3d

at 525-26; *Dickerson*, 336 F.3d at 403-06; *Beskind*, 325 F.3d at 516-17; *Bainbridge*, 311 F.3d at 1111-13. With respect to the second step of this inquiry, the Fourth, Fifth, and Sixth Circuits have characterized their own test as requiring "strict scrutiny" of state importation regulations. *See Heald*, 342 F.3d at 524; *Dickerson*, 336 F.3d at 396; *Beskind*, 325 F.3d at 515. By comparison, the Eleventh Circuit has applied a less stringent standard, requiring that the challenged ban be "closely related" to a core Twenty-First Amendment power to survive review. *Bainbridge*, 311 F.3d at 1106.[3]

The circuits that have invalidated direct shipment bans are further split over the question of remedy -- an issue which has tremendous implications for State enforcement efforts, *see infra* pp. 19-20. After striking down North Carolina's ban on direct shipment, the Fourth Circuit concluded that the appropriate remedy for the State's discriminatory treatment of out-of-state wineries was the invalidation of the exception permitting local wineries to ship directly to consumers, rather than the invalidation of the State's general ban on direct shipment. *Beskind*, 325 F.3d at 517-520. In contrast, the Fifth Circuit concluded that the better way to remedy the supposed discrimination against out-of-state wineries was to "extend[] benefits" equally, not to "equaliz[e] burdens"; accordingly, the court enjoined the State from enforcing its ban on direct shipment against either in-state or out-of-state wineries. *Dickerson*, 336 F.3d at 407-09.

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3. The Eleventh Circuit has held that the State must demonstrate only that "its statutory scheme is genuinely needed to effectuate the proffered core concern"; it is not required to show the absence of "nondiscriminatory alternatives." *Bainbridge*, 311 F.3d at 1114 & n.17. *Cf. Heald*, 342 F.3d at 524-26 (requiring that State's action be narrowly tailored to least restrictive alternative); *Beskind*, 325 F.3d at 515; *Dickerson*, 336 F.3d at 406.

II.

THE DECISIONS OF THE FOURTH, FIFTH, SIXTH, AND ELEVENTH CIRCUITS MISAPPREHEND THIS COURT'S TWENTY-FIRST AMENDMENT PRECEDENTS

The decisions of the Fourth, Fifth, Sixth, and Eleventh Circuits misapprehend this Court's precedents defining the scope of the Twenty-First Amendment. The two-step framework adopted by these circuits largely rests on their undue reliance on a single case, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). *See Heald*, 342 F.3d. at 523-24; *Dickerson*, 336 F.3d at 400; *Beskind*, 325 F.3d at 514; *Bainbridge*, 311 F.3d at 1108. But as the Second Circuit held, *Bacchus* and other recent cases of this Court interpreting the Twenty-First Amendment can readily be reconciled with, and should be read in light of, the long line of Supreme Court decisions that preceded them. Pet. App. 19a-24a. *Cf. Heald*, 342 F.3d at 522 (characterizing Michigan's reliance on older precedent as "disingenuous at best"). While *Bacchus* prohibits the States from adopting alcoholic beverage regulations that constitute "mere economic protectionism," *Bacchus*, 468 U.S. at 276, neither it nor any of this Court's other precedents can be read to eviscerate the explicit grant of authority conferred upon the States by Section 2 of the Twenty-First Amendment.

Section 2 gives the States broad authority to regulate the importation of alcoholic beverages. It provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As this Court has explained, "[t]he wording of § 2 . . . closely follows the Webb-Kenyon

and Wilson Acts," and was directed toward the same end: "to reinvigorat[e] the State's regulatory role" following a series of this Court's decisions that had relied on the dormant Commerce Clause to invalidate State alcohol importation laws. *Craig v. Boren*, 429 U.S. 190, 205-06 (1976) (citing *Leisy*, 135 U.S. 100 (invalidating Iowa law that banned the sale of alcohol whether produced within or without the State)); *see also Bowman*, 125 U.S. 465 (invalidating Iowa law that required common carrier importing alcohol for resale to obtain a permit); *Rhodes*, 170 U.S. 412 (invalidating Iowa law that prohibited common carrier from delivering alcohol to an unlicensed person within the State).

Accordingly, though the Twenty-First Amendment did not circumscribe Congress's affirmative power to legislate on matters affecting interstate commerce, *see Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), it had a profound effect on the Commerce Clause's negative implications for State regulation of alcohol importation. The Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Indeed, this Court has characterized "[t]he States' regulatory power over this segment of commerce" as "largely 'unfettered by the Commerce Clause.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-15 (1996) (quoting *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939)).

Admittedly, the power conferred upon the States by the Twenty-First Amendment is not wholly unfettered by the Commerce Clause. For example, state alcohol regulations

that "have the practical effect of regulating liquor sales in other States" will run afoul of the Commerce Clause. *Healy v. Beer Institute*, 491 U.S. 324, 342 (1989) (affirming *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 585 (1986)). Likewise, the Commerce Clause may bar state regulations that are intended solely to protect local industry from out-of-state competition. *See Bacchus*, 468 U.S. at 271 (noting Hawaii's admission that "the purpose of the [challenged excise tax] exemption was to aid Hawaiian industry"). Additionally, the Court has held that the Twenty-First Amendment does not shield state regulations from challenge under the Equal Protection Clause, *Craig*, 429 U.S. at 208-09, or the First Amendment, *44 Liquormart*, 517 U.S. at 516.

But this Court has made clear that concerns about economic protectionism in no way swallow the Twenty-First Amendment whole. Thus, as the Second Circuit held, while this Court has

> "limited" the scope of Section 2 only insofar as it related to a state's attempt to regulate the traffic of alcohol outside of its borders or in violation of other powers reserved to the federal government[,] . . . the Court [has] unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders, it "primarily created an exception to the normal operation of the dormant Commerce Clause."

Pet. App. 23a (quoting *Craig*, 429 U.S. at 206).

The framework used by the Fourth, Fifth, Sixth, and Eleventh Circuits simply misapprehends this basic jurisprudential principle. Under the first step of this

framework, nearly any regulation governing the importation of alcohol arguably will qualify as "discriminatory." *See Bridenbaugh*, 227 F.3d at 848. But it was this very susceptibility to classification as "discriminatory" that led to the repeated invalidation of alcohol importation regulations in the late nineteenth century. Pet. App. 14a. And it was this invalidation that led, in turn, to the adoption of the Wilson and Webb-Kenyon Acts and Section 2 of the Twenty-First Amendment. *Id.* at 14a-15a.

Nor does the second step of this analysis give proper weight to the extensive powers accorded the States by the Twenty-First Amendment. This Court has held that Section 2 of the Twenty-First Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also Hostetter*, 377 U.S. at 330; *State Board of Equalization v. Young's Market* Co., 299 U.S. 59 (1936). In the face of this precedent, the Fourth, Fifth, Sixth, and Eleventh Circuits have held that the Twenty-First Amendment can save a "discriminatory" statute only if the law advances one of the Amendment's "core concerns." *See Heald*, 342 F.3d at 524-26; *see also Dickerson*, 336 F.3d at 406; *Beskind*, 325 F.3d at 517; *Bainbridge*, 311 F.3d at 1114. All of these courts but the Eleventh Circuit will then uphold a statute only if that core concern "cannot be adequately served by reasonable nondiscriminatory alternatives." *Heald*, 342 F.3d at 527; *see also Dickerson*, 336 F.3d at 406; *Beskind*, 325 F.3d at 517.[4]

4. Of course, the States may seek to preserve legislation regulating any product which lacks a connection to the Twenty-First (Cont'd)

The Second Circuit, in contrast, has accorded appropriate weight to the "clear and unambiguous language of section 2." Pet. App. 13a. It has given the States authority to regulate the importation of alcohol in the service of "valid regulatory interests," while at the same time declaring impermissible state regulation that is designed merely to hinder competition. *Id.* at 25a. That this understanding of the Twenty-First Amendment will lead courts to uphold regulation of alcoholic beverages which might not otherwise survive Commerce Clause scrutiny is not a strike against it, as the plaintiffs appear to assume. *See* Pet. at 21. Rather, it is the whole point of the Twenty-First Amendment, as interpreted and applied by this Court.

III.

NEW YORK'S DIRECT SHIPMENT BAN IS CONSTITUTIONAL EVEN UNDER THE ANALYSIS USED BY THE FOURTH, FIFTH, SIXTH, AND ELEVENTH CIRCUITS

Even applying the two-step test advanced by the Fourth, Fifth, Sixth, and Eleventh Circuits, New York's statutory scheme for regulating direct shipment of alcoholic beverages would be fully constitutional. Apparently unlike the

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Amendment "by showing that [the statute] advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives." *See, e.g., New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

regulatory regime at issue in *Heald*, New York's regulatory regime permits an out-of-state winery to obtain a license authorizing direct shipment to consumers if the winery establishes a physical presence within the state. *Compare* ABC Law § 3(37) *with Heald*, 342 F.3d at 521 (noting Michigan's statement that "there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents"); *see also Beskind*, 325 F.3d at 516 (making license available upon satisfaction of physical presence requirement would cure constitutional infirmity). This aspect of New York's scheme fundamentally alters the constitutional calculus.

The relevant provisions of the ABC law comport with the dormant Commerce Clause. New York's alcohol regulatory regime is not facially discriminatory. The ABC Law specifies that *all* wine sold to consumers in New York, whether produced in New York or out of state, is required to pass through parties licensed by the SLA. *See* ABC Law § 100(1) ("No person shall . . . sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."). Sections 102(1)(c) and (d) simply make clear that alcoholic beverages are not exempt from the strictures of the ABC Law merely because they are shipped into New York from outside the State. As the Second Circuit observed, "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long the winery establishes a physical presence in the state." Pet. App. 25a; *see also* ABC Law § 3(37).

Nor does the ABC Law have a discriminatory effect on interstate commerce, since New York's law permits an out-

of-state winery to obtain a license to ship directly to consumers. Indeed, in striking down North Carolina's regulatory regime, the Fourth Circuit suggested that a regime with exactly the option provided for under New York's law — "requiring out-of-state wineries to import their wine into North Carolina to an in-state location and . . . treating that location in the same manner as it treats in-state winery locations" — would pass constitutional muster. *Beskind*, 325 F.3d at 516; *see also Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 212 (2d Cir. 2003) ("[E]ven if the Plaintiffs' evidence did demonstrate that it would be 'unworkable' and 'uneconomic' for them to establish brick-and-mortar outlets in New York, that is insufficient to establish a discriminatory effect."); *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1107-08 (3d Cir. 1997) (New Jersey requirement that practicing attorneys have a "bona fide office" in the state did not discriminate against out-of-state attorneys so as to violate the dormant Commerce Clause).

Furthermore, the challenged provisions of the ABC Law do not impose burdens on interstate commerce that are incommensurate with local benefits. Indeed, it is doubtful whether the law imposes any burden whatsoever on "interstate commerce," as distinct from a burden that might be felt by particular interstate firms. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations"). New York wine wholesalers, in addition to offering at least 47 brands from New York wineries, offer a wide range of out-of-state wines, including at least 49 brands from Oregon wineries, 39 brands from Washington State, more than 750 brands from California,

and more than 3,600 brands from abroad. Jt. App. 1438, 1480.[5] Indeed, the availability of out-of-state brands of wine increased significantly between 1991 and 2001. *Id.* at 1438, 1481. The dormant Commerce Clause simply does not guarantee a market structure in which smaller, lesser-known out-of-state firms will be as successful in selling their products as larger ones. *See Exxon*, 437 U.S. at 127.

Any burden on interstate commerce that may exist is more than justified by important state interests. Stringent licensing requirements are a critical means through which New York secures compliance with its laws and regulations relating to alcoholic beverages, including those relating to collection of taxes and minimum age requirements. Jt. App. 1556-58, 1561-62. Enforcement of these requirements, in turn, decreases underage drinking, alcohol-related motor vehicle accidents, and chronic heavy drinking. *Id.* at 1374-80, 1520-26. It would be difficult, if not impossible, for the State to enforce these stringent licensing requirements against firms that lack any physical presence in the State. As the Second Circuit pointed out, a firm's presence facilitates both the inspection of required records and the imposition of disciplinary measures. Pet. App. 25a-26a. Thus, "[r]equiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless." *Id.* at 28a.

These concerns about accountability are not just talk. New York's SLA has a very active enforcement program, with 2,025 charges for selling alcoholic beverages to minors sustained in 2000. Jt. App. 1562. That same year, a total of

5. "Jt. App." refers to the Joint Appendix filed in the Court of Appeals.

4,793 matters were referred to the SLA's Office of Counsel to commence disciplinary proceedings against licensees. *Id.* at 1579. The SLA disposes of thousands of disciplinary matters, and conducts thousands of investigations and hundreds of inspections of licensed premises annually. *Id.* at 1561-62, 1577-80, 1593, 1605, 1613, 1631-37, 1672-8, 1680-81, 1701-08, 1711-12. Permitting wineries with no presence in New York to obtain licenses to sell alcoholic beverages in New York would result in the entry into the market of more entities than the SLA could feasibly supervise and hold accountable. In any event, New York's interests are indubitably "core concerns" protected by the Twenty-First Amendment, and thus would "save" New York's regulatory regime from invalidation.[6]

IV.

PETITIONERS' PRIVILEGES AND IMMUNITIES CLAIM DOES NOT WARRANT REVIEW BY THIS COURT

Regardless of whether the Court grants certiorari on the questions related to plaintiffs' Commerce Clause claim, it should decline to review plaintiffs' Privileges and Immunities Clause claim. The circuits are not divided on this issue, and petitioners do not assert a split. *See* Pet. at 24-27.

In any event, New York's regime for regulating alcoholic beverages does not violate the Privileges and Immunities Clause. This clause prohibits states from discriminating on

6. As part of his 2004 budget package submitted to the New York State Legislature, the Governor of New York has proposed enactment of legislation that would, *inter alia*, permit out-of-state wineries located in states with reciprocal privileges to directly ship wine to New York residents. Given the inherent uncertainty surrounding the enactment of any proposed legislation, this proposal has no effect on the cert-worthiness of this case.

the basis of state citizenship or residency. *See* U.S. Const. art. IV, § 2, cl. 1. Though New York's alcohol regulatory regime requires a wine producer to establish a physical presence in the State in order to obtain a license for shipping wine directly to state residents, this requirement applies equally to residents and non-residents. *See* ABC Law § 3(37). Because the "statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents," it does not even implicate the Privileges and Immunities Clause. Pet. App. 29a.

The Second Circuit's conclusion on this point is consistent with other decisions upholding "presence" requirements in the face of a Privileges and Immunities Clause challenge. For example, this Court has indicated that requiring attorneys to maintain an office within a state as a condition of practicing law would not violate the Privileges and Immunities Clause. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 69-70 (1988) (invalidating attorney residency requirement but identifying "office requirement" as a viable and preferable alternative); *see also Tolchin*, 111 F.3d at 1113 (upholding similar New Jersey rule).[7]

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7. This Court does not appear to have construed the Privileges and Immunities Clause to protect a person who remains in one State, but demands the benefits he might obtain by being physically present in another. *See, e.g., Saenz v. Roe*, 526 U.S. 489 (1999) (holding that Clause protects "nonresidents who *enter* a State . . . to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing," (internal citations omitted; emphasis added)); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (observing that the Privileges and Immunities Clause "was designed to insure to a citizen of State A who *ventures into* State B the same privileges which the citizens of State B enjoy") (emphasis added).

Petitioners also err in assuming that an expansive interpretation of the Privileges and Immunities Clause would overcome the powers granted to the States by Section 2 of the Twenty-First Amendment. *See* Pet. at 25. This Court has held that the Twenty-First Amendment does not trump individual rights guaranteed by the Equal Protection Clause, *Craig*, 429 U.S. at 208-209, or by the First Amendment, *44 Liquormart*, 517 U.S. at 516. It also has acknowledged that the Twenty-First Amendment may limit the effect of constitutional provisions other than the Commerce Clause, at least where the State's "transparently clear" authority over importation is at issue and the only rights at stake are "purely economic." *Craig*, 429 U.S. at 206-07. Thus, even if this Court were to adopt the petitioners' novel and expansive interpretation of the Privileges and Immunities Clause, its reach would appropriately be limited by the dictates of the Twenty-First Amendment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari limited to the questions whether New York's ban on direct shipment of alcoholic beverages by unlicensed out-of-state wineries is within the powers conferred by the Twenty-First Amendment and, if not, whether the ban violates the dormant Commerce Clause. The Court should deny the question whether the ban violates the Privileges and Immunities Clause.

Respectfully submitted,

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